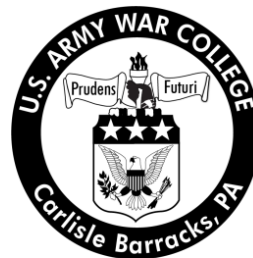


# Civilian Research Project USAWC Fellow

## LAWFARE: A CURRENT THREAT OR MUCH ADO ABOUT NOTHING?

by

Lieutenant Colonel John Swanberg  
United States Army Reserve



United States Army War College  
Class of 2013

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REPORT DOCUMENTATION PAGE				Form Approved OMB No. 0704-0188	
<p>The public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports (0704-0188), 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number. <b>PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ADDRESS.</b></p>					
1. REPORT DATE (DD-MM-YYYY) xx-04-2013		2. REPORT TYPE CIVILIAN RESEARCH PROJECT		3. DATES COVERED (From - To)	
4. TITLE AND SUBTITLE LAWFARE: A CURRENT THREAT OR MUCH ADO ABOUT NOTHING?				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S) Lieutenant Colonel John Swanberg United States Army Reserve				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Dr. Richard Shultz Fletcher School of Law and Diplomacy, Tufts University, Medford, MA 02155				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES) Mr. William J. Flavin  U.S. Army War College, 122 Forbes Avenue, Carlisle, PA 17013				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION / AVAILABILITY STATEMENT Distribution A: Approved for Public Release. Distribution is Unlimited.					
13. SUPPLEMENTARY NOTES Word Count: 5,126					
14. ABSTRACT <p>Lawfare is a recently coined term which in its broadest sense refers to the involvement of legal process in modern day warfare. Lawfare can range from litigation in federal or international courts to the exploitation of U.S. Rules of Engagement. It can also be defined as using or misusing law as a substitute for traditional military means to achieve a strategic or operational military objective. This paper examined specific legal cases where the misuse of legal process was alleged, including accusations that detainees were instructed by Al Qaeda trainers to bring false claims of torture to influence public opinion against the United States and drain resources through protracted litigation. Supreme Court decisions were examined with an eye toward any deleterious effects on military operations. I have concluded that litigation lawfare is largely a myth and that cases decided by the Supreme Court provided a much needed check on executive authority. The threat of lawfare was overstated and was adequately handled by our judicial system.</p>					
15. SUBJECT TERMS Habeas corpus, detention, litigation, torture.					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT  UU	18. NUMBER OF PAGES  30	19a. NAME OF RESPONSIBLE PERSON
a. REPORT UU	b. ABSTRACT UU	c. THIS PAGE UU			19b. TELEPHONE NUMBER (Include area code)



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Report Date: April 2013

Page Count: 30

Word Count: 5,126

Key Terms: Habeas corpus, detention, litigation, torture.

Classification: Unclassified

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## **LAWFARE: A CURRENT THREAT OR MUCH ADO ABOUT NOTHING?**

### **Concept of Lawfare**

The term “lawfare” is becoming a widely used term among military and legal scholars though it is used in different ways depending on one’s point of view. Some writers and policy makers use the term in a pejorative sense referring to our enemy’s use of legal process to the disadvantage of the United States as “engaging in lawfare” implying a misuse of the law. One of the earliest writers to directly address the concept was Major General Charles Dunlap who wrote a series of articles on lawfare. Dunlap, formerly The Deputy Judge Advocate General of the Air Force, initially defined it as “a method of warfare where law is used as a means of realizing a military objective.”<sup>1</sup> He observed that one dimension of lawfare being use by U.S. opponents was “a cynical manipulation of the rule of law and the humanitarian values it represents.”<sup>2</sup> That is to say, for example, our opponents highlighting the civilian casualties that are inevitable in armed conflict, playing on both U.S. and world public opinion in an attempt to limit our use of military power. Tactically, the enemy’s use of lawfare could include hiding in mosques so they could claim the U.S. was destroying religious objects or by falsely claiming torture when captured.<sup>3</sup> Dunlap later clarified and refined his definition posing a more expansive interpretation as “the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective.”<sup>4</sup> This definition is contrasted by the views of some of the lawyers in the George W. Bush administration such as Jay Bybee, John Yoo and Alberto Gonzales, who viewed the use of legal process as an unlawful tactic used by our enemies, abetted by attorneys taking

issue with government policies.<sup>5</sup> Former Defense Secretary Donald Rumsfeld, thinking more in global terms defined lawfare as the “judicialization of international politics.”<sup>6</sup> Rumsfeld’s concern was that weaker nations might seek indictments against U.S. officials in foreign domestic courts or international forums like the International Criminal Court, for actions taken in response to the 9/11 attacks. In addition to the foregoing there is also the concept of “reverse lawfare” wherein the administration would take preemptive steps to deny the applicability of legal restrictions on operations such as choosing a detention location beyond U.S. court jurisdiction and supervision.<sup>7</sup> While there is no universally accepted definition the concept is subject to examination so long as the context in which the term is used remains clear.

Early warnings by Bush officials and other like-minded writers sounded the alarm that Al Qaeda and other terrorist groups would use U.S. and international courts to wage lawfare against the United States in the aftermath of the 9/11 attacks and our response.<sup>8</sup> The 9/11 attacks against the United States, perpetrated by non-state actors, presented a unique challenge in formulating a U.S. response. Were the 9/11 attacks acts of war or criminal acts? An act of war would allow a military response while a criminal act would thrust the matter into the criminal justice system. The U.S. determined the attack was an act of war even though the attack was orchestrated by a non-state entity as opposed to an attack by another nation. War traditionally had been seen as acts of aggression involving two nations such as Japan and the United States during World War II. While there had been devastating terrorist attacks in the past, e.g., the World Trade Center bombing in 1993, the attack on the USS Cole, and the bombing of the U.S. Embassy in Sudan, there had never been a coordinated attack on the scale

of the 9/11 attacks.<sup>9</sup> The Administration's decision to use the military was quickly codified by Congress with the Authorization for Use of Force (AUMF)<sup>10</sup>, followed by an Executive Order by President Bush. The Executive Order found that in order to protect the United States and its citizens from further attack, the nation's military forces would be called upon to identify the terrorists, disrupt their activities and eliminate their ability to conduct further attacks. President Bush further ordered the detention and trial by military tribunal of individuals involved in the attacks.<sup>11</sup> Several Bush administration officials anticipated that the enemies of the United States would use judicial process to challenge the detention of those captured on the battlefield, or file lawsuits seeking damages or other judicial remedies with an eye toward thwarting U.S. efforts on the battlefield or in the court of public opinion.<sup>12</sup>

In the early months of the military campaign in Afghanistan several hundred Taliban and Al Qaeda fighters were captured. Under the traditional laws of war it was perfectly acceptable to capture and detain enemy fighters as prisoners of war, without resort to trial, and for the duration of the conflict.<sup>13</sup> A distinguishing feature in past armed conflicts was that captured enemy soldiers were clearly identifiable as such by wearing a uniform. That lack of instant identification as a combatant in Afghanistan would prove troublesome as the conflict continued. When the number of captured multiplied it became evident that facilities in Afghanistan were inadequate to serve as long term detention camps.<sup>14</sup> While a few facilities were considered, such as military bases in the U.S. and Guam, they were rejected since they could endanger U.S. citizens or were vulnerable to attack.<sup>15</sup> The selection of the Naval installation at Guantanamo Bay, Cuba not only offered a safe and secure facility, it also had the distinct advantage of not being

part of U.S. sovereign territory and thus, in an opinion from the Office of Legal Counsel, was beyond the jurisdiction of U.S. courts.<sup>16</sup> Detention at Guantanamo Bay would deny detainees access to U.S. courts and minimize, if not eliminate judicial scrutiny.<sup>17</sup> Denying access to U.S. courts was in effect “reverse lawfare” since detention would be decided by the military without affording anyone the opportunity to contest their detention in U.S. civilian courts.<sup>18</sup> The aim of President Bush’s Executive Order was to have the Secretary of Defense promulgate orders and regulations concerning detention and then to try detainees by military commission if they had committed a violation of the law of war or other applicable laws.<sup>19</sup> The goal to avoid judicial involvement was soon thwarted by a rapid succession of legal filings by the defense lawyers, both civilian and military, challenging the continued detention of individuals who were held at Guantanamo Bay.<sup>20</sup> Lawfare it seemed had just begun.

### Challenging Detention

One element of lawfare, detested by many in the Bush administration was the notion that a terrorist, assisted by a U.S. attorney no less, could challenge his very detention by military forces and seek release from custody.<sup>21</sup> Under different circumstances a terrorist act could be treated as a criminal act and all the protections of due process would be available to the defendant to challenge detention. Protections are built into the system such as the requirement for a prosecutor to make at least a minimal offer of proof to a neutral judge that would justify holding a suspect in jail upon filing a charge. No such mechanism exists for captured enemies during wartime. No questions arose during World War II when U.S. forces captured and detained German or Japanese soldiers, nor did the U.S. challenge the notion that its own captured

soldiers were subject to detention. That capture and detention are incident to war has been well established not only by universal practice but in previous decisions by our own Supreme Court.<sup>22</sup> How was this conflict different, and what was it that gave rise to the notion that a captured enemy soldier could challenge his very detention by the nation that he had attacked? Was the strategy of lawfare at work whereby the terrorists would misuse America's own legal system against the government to gain unfair advantage?

### Rasul v. Bush

As previously stated the U.S. responded to the 9/11 attacks by choosing a military response rather than a criminal proceeding. Upon determination that the attack was orchestrated by Al Qaeda, which trained and quartered itself in Afghanistan with cooperation from the Taliban controlled government, it was decided to send military forces "to identify the terrorists, disrupt their activities and eliminate their ability to conduct further attacks."<sup>23</sup> The follow up Executive Order authorized detention and trial of those captured in Afghanistan with Guantanamo Bay as the facility for detention and eventual trial. Neither the Taliban or Al Qaeda members wore uniforms, nor did they fight in recognizable formations normally associated with traditional warfare. Another distinction from traditional war is that they were not "Germans" or "Japanese", as in World War II. Rather they were from many different nations such as Yemen, Australia, Saudi Arabia and Pakistan, all nations that we were on friendly terms with yet citizens of these and other nations were allegedly members of Al Qaeda.<sup>24</sup> As a result U.S. forces relied heavily on assertions by capturing forces such as the Northern Alliance, that individuals they turned over to U.S. forces were involved in armed attack or arrested for

other terrorist activities.<sup>25</sup> Several hundred men were captured and detained at Guantanamo Bay as enemy combatants without the indicia of certainty that normally accompanied war prisoners. In the absence of any form of process to proclaim their innocence, twelve of the detainees filed a complaint in U.S. District Court petitioning for, among other forms of relief, a writ of habeas corpus, challenging the legality of their detention.<sup>26</sup> The cases, consolidated as *Rasul v. Bush*, were initially rejected by the district court for lack of jurisdiction fulfilling the aim of the administration to keep detention matters out of U.S. courts. However, the Supreme Court granted certiorari and reviewed the case. The Supreme Court reversed the district court's jurisdiction determination and held that even though Guantanamo Bay was not a sovereign possession of the U.S., the government exercised a sufficient amount of control to bring activities there under the jurisdiction of U.S. courts. It further held that because the writ of habeas corpus acts not on the person held but rather the captor that jurisdiction would attach.<sup>27</sup> The captor in this case of course was the Executive Branch acting under the Executive Order promulgated by President Bush. If the initial complaint was a form of lawfare, was it an unlawful tactic or a misuse of the law? The holding of our own Supreme Court would suggest that it was not. *Rasul v. Bush* stood for the proposition that an individual, alleged to be an enemy combatant, could seek review by a U.S. court to challenge the basis for his detention, since many claimed they had no involvement in the conflict at all. While the court recognized that the nation was at war and that a military response was justified, it was also a signal to the administration that its actions would not escape judicial scrutiny.<sup>28</sup> The Bush administration's concern regarding habeas petitions and the desire to avoid court involvement surfaced shortly after the

9/11 attacks. The Office of Legal Counsel (OLC) authored a memorandum to the General Counsel for the Department of Defense responding to an inquiry that asked whether a federal district court would have jurisdiction to entertain a writ of habeas corpus from a non U.S. citizen detainee held at Guantanamo Bay.<sup>29</sup> The opinion, authored by John Yoo and Patrick Philbin cautioned that the courts could find a way to hear such a petition, but under the circumstances it probably would not.<sup>30</sup> It was evident that Secretary Rumsfeld's concern of "judicialization" and the prospect of the enemy engaging in lawfare required an opinion on the chances of judicial intervention. According to Jack Goldsmith, the head of the OLC from the fall of 2003 to the summer of 2004, an overriding concern of administration officials was to maintain as much unilateral authority to run the war with the President to the exclusion of not only the judiciary, but Congress.<sup>31</sup> This later turned out to be a fatal flaw in much of the administrations battle in the lawfare realm. The Supreme Court proved to be much more deferential to the Executive branch when it works in concert with the Congress than it is when the Executive acts unilaterally.<sup>32</sup> While *Rasul* established an important precedence it was not the only Supreme Court decision that impacted the notion of lawfare. The same day the *Rasul* opinion was released another case decision was released that dealt a further blow to the administrations go it alone approach.

#### Hamdi v. Rumsfeld

Yaser Hamdi, an American citizen by birth, was captured in Afghanistan by the Northern Alliance and turned over to U.S. forces shortly thereafter. He was transported to Guantanamo Bay and upon discovery that he was a U.S. citizen, transferred to the United States and held at a Navy brig in Charleston, South Carolina.<sup>33</sup> Hamdi's father

filed a habeas petition claiming that his son was in Afghanistan for relief work and was not in the country long enough to have trained with the Taliban.<sup>34</sup> After the petition was denied by lower courts the case was granted a review by the Supreme Court. The Court held that Hamdi had a right to challenge his status as an enemy combatant and the only meaningful way for him to do so required the government to notify him of the basis for his detention and afford him the opportunity to be heard and challenge the factual basis for his detention.<sup>35</sup> The Court's holding did not limit the military's ability to capture an enemy combatant, nor did it impose any due process requirements during initial detention. It did however impose some due process for *continued* detention to allow what may be an innocent person a right to rebut the factual basis for his continual detention.<sup>36</sup> The court remanded the case back to the lower courts to address the merits of Hamdi's claim.<sup>37</sup> In the governments favor, the Court agreed that the AUMF authorized the President to capture and detain enemy combatants for the duration of the conflict as was the custom in other armed conflicts.<sup>38</sup> This holding in a sense made this a hybrid of traditional rules of war concerning detainees adding an element of U.S. constitutional rights of due process. While the court acknowledged the government's right to capture and hold enemy combatants, it made clear that "a state of war is not blank check" for the President when making decisions concerning the detention of U.S. citizens.<sup>39</sup> Despite the best efforts of administration officials and lawyers it was becoming rapidly clear that the judiciary would play a role in the current conflict. Securing a basic right to challenge the factual basis for continued detention does not equate to an unfair advantage or propaganda victory for our enemies. If Rasul and Hamdi was lawfare, it was only in the broadest sense since the outcome only required



the U.S. to add elements of due process to the system but otherwise garnered no discernable strategic gain.

### Hamdan v. Rumsfeld

A third case, yet again dealing with habeas petitions was decided in 2006, two years after *Rasul* and *Hamdi*, but directly linked to both cases. In response to the decisions upholding a detainee's right to petition the federal courts for a habeas corpus writ, Congress passed the Detainee Treatment Act of 2005, (DTA) restricting the jurisdiction of the federal courts to review aspects of the detention program, as well as eliminating habeas corpus for enemy combatants.<sup>40</sup> It later passed the Military Commissions Act of 2006, which as its title suggests, set up military commissions to try enemy combatants for war crimes but also reinforced the habeas denial contained in the DTA.<sup>41</sup> The DTA established Combatant Status Review Tribunals (CSRTs) in an effort to comply with the *Rasul* and *Hamdi* rulings to provide detainees the limited due process rights mandated by the court.<sup>42</sup> Congress also designated the D.C. Circuit court as the sole reviewer of CSRT decisions but limited the review to determine whether or not the Department of Defense properly followed its own procedural rules.<sup>43</sup> Though the DTA and MCA were not unilateral administrative decisions, the limitations on habeas petitions continued the government's untenable position with respect to the earlier rulings in *Rasul* and *Hamdi*. The Supreme Court granted review to one of the habeas challenges by a detainee whose case was pending when the DTA was passed. Salim Hamdan was a Guantanamo detainee who was alleged to be, among other things, the driver and bodyguard for Osama bin Laden.<sup>44</sup> Charged with law of war violations of

conspiring to attack civilians, to commit murder and to engage in terrorism, Hamdan challenged not only the lawfulness of his detention but the government's authority to try him by the military commission system set up under the President's Executive Order issued shortly after the 9/11 attacks. The Court determined that the DTA's jurisdiction limitation did not apply to Hamdan.<sup>45</sup> More importantly it found that the commission system in place at the time was seriously flawed and expressed doubts that conspiracy was a recognizable war crime.<sup>46</sup> In response to the Court's ruling, Congress passed the MCA and set up a commission system that addressed the concerns of the Court but reapplied the habeas restrictions drafted into the DTA. As a result of the MCA a number of pending habeas cases were consolidated for appeal to the D.C Circuit.<sup>47</sup> The consolidated cases, known as *Boumediene v. Bush* made their way to the Supreme Court to determine once again the legality of the habeas limitations placed on the Guantanamo detainees.<sup>48</sup>

#### *Boumediene v. Bush*

In *Boumediene*, the Court reviewed the process of the CSRTs and determined that they were not a legitimate substitution for the right to challenge the legality of their detention.<sup>49</sup> The Court cited the lack of meaningful representation and the presumption of validity of the government's evidence against the detainee as falling short of habeas rights that the Supreme Court had established for non-citizen detainees in prior cases.<sup>50</sup> Further the Court found that the DTA and MCA were unconstitutional attempts to strip the federal courts jurisdiction over detainee cases.<sup>51</sup> The Court's lengthy opinion boiled down to two requirements, first was a detainees right to a meaningful opportunity to demonstrate that he is being held illegally, and second, that federal courts must

maintain the power to order release of an individual if he has been unlawfully detained.<sup>52</sup>

The Court's decision was a clear check on the administration's endeavors to keep the courts and lawyers out of the detention business. It was an unreasonable assumption that the President possessed the authority to unilaterally detain people for an undetermined time leaving the detained person no recourse to challenge the basis for his detention. This would be particularly egregious for someone held based on scant or unreliable evidence. It is also highly unlikely that Al Qaeda or the Taliban had the foresight to produce a strategy that would anticipate the nuanced constitutional issues presented in the foregoing cases. While detaining enemy soldiers in past conflicts was largely unquestioned, what made the current conflict different? Practically everything. Taliban and Al Qaeda were not traditional enemy forces that we had faced in the past. In the past battles fought were largely force on force, enemy soldiers were clearly identifiable and often captured immediately after a battle. This was mostly true in Iraq but not Afghanistan. While some detainees were captured in a combat zone, they did not wear uniforms, did not always carry arms openly making it difficult to know exactly what an individual's involvement was in the conflict. Additionally government conduct in wartime is now far more regulated and constrained by domestic criminal law, the War Powers Act, the Geneva Conventions and other war related statutes.<sup>53</sup> To create a detention scheme that did not give a potentially innocent person a chance to challenge his detention was a fundamentally unfair and unsound policy as evidenced not only by the Supreme Court decisions in the foregoing cases, but by the voluntary release of hundreds of detainees prior to the "end" to the conflict.

## Torture

One of the most controversial aspects of the current conflict is the use, or alleged use of torture to gather intelligence from detainees. Part and parcel of the war on terror was the prevention of future attacks on the United States.<sup>54</sup> One readily apparent method of prevention was to know the enemies plans for future attacks. Interrogation of captured combatants could reveal future plans or other actionable intelligence that would assist the government in preventing another attack.<sup>55</sup> Bush administration officials anticipated that because of the committed nature of the enemy, usual interrogation methods would not be effective.<sup>56</sup> This conclusion led the administration to seek legal guidelines on alternative techniques that could be used by government interrogators.<sup>57</sup>

Torture, in its broadest sense had been formally outlawed by a federal statute that implemented the global treaty that banned its use.<sup>58</sup> The guidelines that the administration sought came from the OLC, in an opinion authored by John Yoo, the deputy to the Assistant Attorney General of the OLC. The opinion he drafted later became known as the infamous “torture memo.”<sup>59</sup> The memo defined torture as “acts... that are specifically intended, to inflict severe pain or suffering, whether mental or physical.”<sup>60</sup> The opinion further specified that to be considered torture, the infliction of physical pain “must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”<sup>61</sup> Yoo’s memo was controversial because of its narrow definition of torture and the contention that any act, however objectionable, that fell short of the definition was not torture.<sup>62</sup> The memo also states that the production of pain alone does not amount to torture unless

causing pain is the sole objective.<sup>63</sup> In other words an interrogator could cause a detainee pain if it is a by- product of intelligence gathering and not inflicted specifically for the sake of cruelty or punishment. The opinion was written not only to provide guidance to the field, it also served as a preemptive strike (reverse lawfare) against Al Qaeda's anticipated lawfare tactic of claiming abuse upon capture, by narrowing the legal definition of torture and providing legal defenses to interrogators.<sup>64</sup> Claims of torture were seen by many officials and commentators as another example of the enemy engaging in lawfare. Claiming abuse was a tactic allegedly advocated by Al Qaeda in a document that was referred to as "Manchester Manual."<sup>65</sup> The manual was recovered during a search on a suspected Al Qaeda member's home in Manchester, England, in 2000.<sup>66</sup>

Several writers, pundits and politicians have made reference to the manual, most notably then Secretary of Defense Donald Rumsfeld. During an interview in 2005 concerning detainee abuse allegations Rumsfeld said "These detainees are trained to lie, they're trained to say they were tortured, and the minute we release them or the minute they get a lawyer, very frequently they'll go out and they will announce that they've been tortured. The media jumps on these claims, reporting them as "another example of torture, when in fact, (terrorists have) been trained to do that, and their training manual says so." <sup>67</sup>

Conservative commentator and attorney David Rivkin repeated Rumsfeld's view claiming the manual instructs detained operatives to claim torture and mistreatment.<sup>68</sup> There is however, a twofold problem with this interpretation of the manual. The first problem is the fact that the manual was discovered in 2000, before the 9/11 attacks.

Though Al Qaeda had been active prior to 9/11, any attack orchestrated by them was treated as a criminal matter with the implicit protections afforded by the U.S. justice system. The author of the manual is unknown and it is only conjecture that its directives contemplated involvement in U.S. courts and prisons as opposed to legal systems of other nations where the use of torture may be common. Secondly, a plain reading of the manual offers no directive to Al Qaeda members to make *false* claims of torture. The manual states that at the beginning of a trial “brothers must insist on proving that torture was inflicted on them by State Security (investigators) before the judge.”<sup>69</sup> It also encourages members to complain of mistreatment while in prison. One can easily assume, as it has been contended, that the manual’s author expected torture or mistreatment from countries (other than the United States) and that there would be no need to assert a false claim of torture.<sup>70</sup> While reading the manual as an instruction to operatives captured after the 9/11 attacks fits the lawfare narrative espoused by Rumsfeld, Rivkin and a host of others, it is an intellectual stretch that is not supported by the text. That is not to say that there have not been false claims of torture, there may have been, but it is more likely than not that torture claims arose from other events such as Abu Ghraib or other confirmed stories<sup>71</sup> of the use of “advanced interrogation techniques”, and not emanating from the Manchester Manual.

#### More Reverse Lawfare

Another component of the lawfare debate has been the role of defense lawyers in the detention process. The administration made clear early on that detention of suspected terrorist would not involve a long drawn out legal process and that lawyers would not be a part of that process. The choice of Guantanamo Bay as a detention

facility, the designation of detainees as unlawful combatants with no right to any legal process to challenge their status, the CSRT's deliberate exclusion of attorney representation appeared to have one particular goal in mind; denying detainees access to any legal process. Until the *Hamdi* decision in 2004 detainees had no access to any legal process allowing them to assert claims of mistaken identity or innocence. The CSRT's, created in response to the Supreme Court's ruling that detainees were entitled to some due process, were designed to keep lawyers out by providing detainees with a non-lawyer military officer as their representative.<sup>72</sup> The Supreme Court, in *Boumediene* determined that the CSRT's were inadequately designed to provide detainees with a meaningful process to challenge detention without the need to resort to filing a habeas claim. The court noted that assigning a "Personal Representative" that had no legal training and was not the detainee's advocate was one of the primary shortcomings of the CSRT process.<sup>73</sup> The various executive orders and legislative acts that sought to suppress legal process were in keeping with the Bush administration's strategy of countering the perceived enemy's use of lawfare.

In addition to the procedural aspects attempting to contain legal rights and process, there was a short lived public relations attack on lawyers who represented detainees. In January 2007, Charles Stimson, then the Deputy Assistant Secretary of Defense for Detainee Affairs, offered the following observation in a radio interview:

As a result of a FOIA request through a major news organization, somebody asked, "Who are the lawyers around this country representing detainees down there?" And you know what, it's shocking. The major law firms in this country-Pillsbury Winthrop, Jenner & Block, Wilmer Cutler Pickering, Covington & Burling here in D.C., Sutherland Asbill & Brennan, Paul Weiss Rifkind, Mayer Brown, Weil Gotshal, Pepper Hamilton, Venable, Alston & Bird, Perkins Coie, Hunton & Williams, Fulbright Jaworski, all the rest of them-are out there representing detainees, and I think, quite honestly, when corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law

firms choose between representing terrorists or representing reputable firms, and I think that is going to have major play in the next few weeks. It's going to be fun to watch that play out.<sup>74</sup>

Senator Scott Brown (R. Massachusetts) added that “In dealing with terrorists our tax dollars should pay for weapons to stop them, not lawyers to defend them.”<sup>75</sup> Despite the rhetoric detainees have been afforded the right to effective counsel as demonstrated by the string of successfully argued cases discussed previously.

### Conclusion

So, what to make of lawfare? While there has been a lot of litigation during the Iran and Afghanistan conflicts it cannot be deemed to be evidence of lawfare, if lawfare is defined as the use or misuse of the law or legal forums to gain an advantage that cannot be achieved by traditional military methods. Most of the litigation has been reactive to some event started by our government such as prolonged detention and inadequate means to challenge the basis for detention. The two most glaring public relations disasters, Abu Ghraib and waterboarding, weren't created by the fertile minds of terrorists. Victories in the Supreme Court were not the product of clever lawyering or misuse of the court system. They were a necessary check on the balance of government powers between the executive, legislative and the judiciary, bolstering our nation's adherence to the concept of the rule of law. While undoubtedly there have been instances of misusing the law by our enemies it has not occurred in the litigation arena to any measurable extent.

As we now continue to engage terrorist threats worldwide, particularly with the increased reliance on unmanned aerial vehicles (UAV) we must be cautious when investing too much authority in the executive branch to wage war. The unilateral



decision making process currently in place (whatever that may be) is controlled solely by the Obama administration without any governing legislation much like the early detention program by the Bush administration. Without effectively engaging Congress soon, the use of UAVs to carry out killings will likely face the same legal challenges faced by the Bush administration causing a diminishment of U.S. world standing and a degradation of our own morality.

#### Endnotes

<sup>1</sup> Charles Dunlap, Jr., "Law and Military Interventions: Preserving Humanitarian Values in 21<sup>st</sup> Century Conflicts" (2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.

<sup>2</sup> Ibid., 11.

<sup>3</sup> Id., 58-59.

<sup>4</sup> Charles Dunlap, Jr. "Does Lawfare Need an Apologia?" *Case Western Journal of International Law* 3 (2010).

<sup>5</sup> Harold H. Bruff, *Bad Advice: Bush's Lawyers in the War on Terror* (Lawrence: University Press of Kansas, 2009), 180-195.

<sup>6</sup> Jack L. Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: Norton, 2007), 59.

<sup>7</sup> Bruff, *Bush's Lawyers*, 134.

<sup>8</sup> Goldsmith, *The Terror Presidency*, 133.

<sup>9</sup> Ibid., 105.

<sup>10</sup> Authorization For the Use of Military Force Joint Resolution, Public Law 107-40, 115 Stat. 224 (2001).

<sup>11</sup> George W. Bush, *Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War on Terrorism*, 66 Fed. Reg. 57831, reprinted in Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005), 25.

<sup>12</sup> Bruff, *Bush's Lawyers*, 133.

<sup>13</sup> John Yoo, *War by Other Means: An Insiders Account of the War on Terror* (Chicago: University of Chicago Press, 2006), 129.

<sup>14</sup> Goldsmith, *The Terror Presidency*, 108.

<sup>15</sup> *Ibid.*, 108.

<sup>16</sup> Yoo, *War by Other Means*, 140.

<sup>17</sup> *Ibid.*, 108.

<sup>18</sup> Bruff, *Bush's Lawyers*, 182.

<sup>19</sup> George W. Bush, *Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War on Terrorism*, 66 Fed. Reg. 57831, reprinted in Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005), 25.

<sup>20</sup> Yoo, *War by Other Means*, 130. The Office of Legal Counsel is an office within the Department of Justice that provides, among other things, interpretations of the federal law and the Constitution for the executive branch.

<sup>21</sup> *Ibid.*, 152

<sup>22</sup> *Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942).

<sup>23</sup> Authorization For the Use of Military Force Joint Resolution, Public Law 107-40, 115 Stat. 224 (2001).

<sup>24</sup> Yoo, *War by Other Means*, 131.

<sup>25</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Yoo, *War by Other Means*, 130.

<sup>29</sup> "Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba," reprinted in Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005), 29.

<sup>30</sup> *Id.*, 37.

- <sup>31</sup> Goldsmith, *The Terror Presidency*, 120-126.
- <sup>32</sup> Bruff, *Bush's Lawyers*, 188.
- <sup>33</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, (2004).
- <sup>34</sup> *Id.*, 510
- <sup>35</sup> *Id.*, 533.
- <sup>36</sup> *Id.*
- <sup>37</sup> *Id.*, 538. Shortly after the Court's decision, Hamdi renounced his U.S. citizenship, was released and returned to Saudi Arabia. Yoo, *War by Other Means*, 160.
- <sup>38</sup> *Id.*, 516.
- <sup>39</sup> *Id.*, 535, citing *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579, 587 (1952).
- <sup>40</sup> The Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.
- <sup>41</sup> Pub. L. No. 109-366, 120 Stat. 2600, 2636.
- <sup>42</sup> *Id.*
- <sup>43</sup> DTA, Section 1005, 28 U.S.C. sec. 2241.
- <sup>44</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 570 (2006).
- <sup>45</sup> *Id.*, 635.
- <sup>46</sup> *Id.*, 603-604.
- <sup>47</sup> Yin, Tung, "Boumediene and Lawfare" *University of Richmond Law Review*, (March 2009).
- <sup>48</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, (2008).
- <sup>49</sup> *Id.*, 2274.
- <sup>50</sup> *Id.*, 2257, citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
- <sup>51</sup> *Id.*, 2274.
- <sup>52</sup> Yin, Boumediene and Lawfare, 877.
- <sup>53</sup> Goldsmith, *The Terror Presidency*, 66-67.
- <sup>54</sup> *Id.*, 74-75.
- <sup>55</sup> Yoo, *War By Other Means*, 166.

<sup>56</sup> Id., 166.

<sup>57</sup> Id., 170-171.

<sup>58</sup> 18 U.S.C. sections 2340, 2340A.

<sup>59</sup> Goldsmith, *The Terror Presidency*, 142.

<sup>60</sup> Memorandum from Jay S. Bybee, Assistant Attorney General, to White House Counsel Alberto Gonzales, Standards of Conduct for Interrogation under 18 U.S.C. sections 2340-2340A, (Aug. 1, 2002), *reprinted in* The Torture Papers: The Road to Abu Ghraib 172, Karen J. Greenberg and Joshua L. Dratel, eds., (New York: Cambridge University Press, 2005).

<sup>61</sup> Id.

<sup>62</sup> Goldsmith, *The Terror Presidency*, 142.

<sup>63</sup> Bybee memorandum, 174.

<sup>64</sup> Id., 207.

<sup>65</sup> Michael J. Lebowitz The Value Of Claiming Torture: An Analysis Of Al Qaeda's Tactical Lawfare Strategy and Efforts To Fight Back 43 Case W. Res. J. Int'l L. (2010-2011).

<sup>66</sup> John Ashcroft, Attorney General, United States Department of Justice, available at <http://www.usdoj.gov/ag/trainingmanual.htm>, last visited 9 January 2013.

<sup>67</sup> Donna Miles, American Forces Press Service, "Al Qaeda Manual Drives Detainee Behavior at Guantanamo Bay" June 29, 2005, Defense.gov News Article, found at <http://www.defense.gov/news/newsarticle.aspx?>, last visited 9 January 2013.

<sup>68</sup> David B. Rivkin et al, Lawfare, Wall St. J., Feb.23 2007, A11.

<sup>69</sup> Al Qaeda Manual 137 (translated excerpts by the U.S. Dep't. of Justice, Dec. 6, 2001) available at <http://www.fas.org/irp/world/para/aqmanual.pdf>.

<sup>70</sup> Larry Siems, *The Battle Lab*, THE TORTURE REPORT, Chapter 5, Part 2 (Sept. 3, 2010) <http://www.thetorturereport.org/report/chapter-5-part-2>.

<sup>71</sup> Dan Eggen, *White House Defends CIA's Use of Waterboarding in Interrogations*, Washington Post, Feb., 7, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/05/AR2008020502764.html>. (wherein the government admitted using the waterboarding technique shortly after 9/11. The use of waterboarding had been reported for years but was confirmed in 2008).

<sup>72</sup> DTA, Section 1005, 28 U.S.C. sec. 2241.

<sup>73</sup> *Boumediene*, 128 S.Ct. at 2260.

<sup>74</sup> A transcript of the relevant portions of the interview may be found on the website of the radio program *Democracy Now!* See Transcript of interview by Amy Goodman with Stephen

Oleskey, Partner at WilmerHale, and Emily Spieler, Dean of Northeastern University School of Law (Jan. 17 2007), *available at* <http://www.democracynow.org/2007/1/17/toppentagonofficialcallsforboycott>.

<sup>75</sup> Senator Scott Brown, made the comment in his January 10, 2010 special election victory speech. Senator Scott Brown, Republican Mass., Special Election Victory Speech (January 10, 2010), *reprinted in Scott Brown's Victory Speech*, N.Y. TIMES, Jan. 19, 2010, <http://www.nytimes.com/2010/01/20/us/politics/20text-brown.html>. The Military Commissions Act mandates that Judge Advocates be provided as defense counsel for accused detainees under 10 U.S.C. § 949(c).

